

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 7 of 1991

BETWEEN:

ELLEN LUCRETIA SKELTON, RONNIE WALSTON
SKELTON and JEFFREY MORRISON SKELTON
(As Administrators of the Estate of
Ellis Skelton, deceased)

Appellants

and

- (1) CONRAD MADURO and OMAR HODGE
(As Administrators of the Estate of
Hogarth Maduro Sr. deceased)
- (2) ALBERT FAHIE, ICENA VIOLA FREEMAN and
ALLEGRA PICKERING
(As Administrators of the Estate of
Emma Fahie nee Skelton, deceased)

Respondents

Before: The Rt. Hon. Sir Vincent Floissac - Chief Justice
The Honourable Mr. Justice C.M.D. Byron, J.A.
The Honourable Mr. Justice A.J. Redhead J.A. (Ag.)

Appearances: Dr. F. Ramsahoye Q.C. and Mr. C.T.S. O'Neal for the
Appellants
Mr. J.S. Archibald Q.C. and Mr. S. Bennet for the
Respondents

1922: June 24;
1993: January 11.

JUDGMENT

SIR VINCENT FLOISSAC, C.J.

The appellants and the respondents are the administrators of the estates of deceased persons who were co-owners of 53 acres of land (the Farm) known as Fish Bay Farm included in the Fish Bay Estate in the island of Tortola in the British Virgin Islands. The nature and proportions of the co-ownership were resolved by the Judicial Committee of the Privy Council on the 28th January 1981 in Privy Council Appeals Nos. 3 & 4 of 1979. There the Board

expressed the opinion and declared that the Farm was beneficially owned in tenancy in common by Ellis Skelton (who was held to be entitled to 26.125 acres) and by the respondents (who were together held to be entitled to 26.875 acres).

The Privy Council referred back to this Court "the question of the proper method of giving effect to those interests, whether by partition (and if so whether on the basis of proportionate areas or proportionate values of areas) or by sale and division of the proceeds in the above proportions". Their Lordships added that "That of course will only be necessary if the parties interested cannot agree". Their Lordships did not approve of "the suggestion made below that Ellis Skelton would be an appropriate person to decide upon the division".

On the 11th June 1985, in Civil Appeal Motion No. 8 of 1984, this Court (acting in accordance with the direction of the Privy Council) ordered as follows:-

- "(1) The Report dated 3rd June 1985 by Chief Surveyor, D. McKeever adopted. 'Lot C' to be marked off as the 2 acres. 2 acres to form part of 14 acres Baylot to be demarcated as shown on plan annexed No. 2.
- (2) The Quarry (agreed to be 6 acres more or less) by abutting on Lot C be awarded to the estate of Ellis Skelton, the said area to be identified by survey to James Morshead or other survey agreed on by the parties.
- (3) A valuation of the quarry excluding equipment be determined by Smith's Gore (Overseas) Ltd, Chartered Surveyors as agreed by the parties.
- (4) The remaining 47 acres more or less be sold by public auction. The parties having the right to bid at said sale, after the same has been valued as agreed by Smith's Gore (Overseas) Ltd. The reserve price to be not less than $\frac{2}{3}$ the full value of said 47 acres more or less.
- (5) The sum realised from sale after deduction of all

expenses incidental thereto and of expenses of James Morshead and of Smith's Gore (Overseas) Ltd to be divided as follows:

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26 24 to the estate of Ellis Skelton

¹
9 24 to the estate of Richard Hogarth Maduro

²⁰
17 24 to the estate of Emma Fahie nee Skelton

- (6) The share of Ellis Skelton's estate, as ascertained above be abated by the value of the quarry as ascertained by Smith's Gore (Overseas) Ltd.
- (7) The abated sum be divided equally between the estate of Richard Hogarth Maduro and the estate of Emma Fahie nee Skelton.
- (8) This order is to take effect from today with no order as to costs."

Paragraph (1) of that order (the 1985 Order) of this Court was duly fulfilled. And on the 21st April 1986, James Morshead (purporting to act pursuant to paragraph 2 of the 1985 Order) executed a plan of survey whereunder he identified the area of the quarry to be 10.131 acres. Unfortunately, the other terms of the 1985 Order were not observed. Instead, the appellants continued to excavate and remove stone and soil from the Farm and purported to do so in the exercise of their rights as sole owners of the quarry or co-owners of the Farm. As a result of the appellants' acts, the respondents instituted suit No. 10 of 1987 against the appellants.

In paragraph 15 of their Statement of Claim, the respondents alleged that: "From October 1983 up to the present time the Defendants, despite continued vigorous protests of the Plaintiffs, have been daily excavating and removing soil material of stones, sand and gravel by means of backhoe, trucks and other heavy vehicular equipment from parts of the 53 acres not limited to the quarry and depositing the same on other lands of the Defendants outside of the 53 acres for the commercial use of filling a pond as land reclamation, thereby causing waste of the 53 acres not limited

to the quarry, and have refused to give to the Plaintiffs a financial account of the activities described in this paragraph, to which the Plaintiffs are entitled as owners in common". In paragraphs 19(5) and 20(5) of the said Statement of Claim, the respondents claimed: "An Account in respect of soil material removed from the 53 acres by the Defendants from October 1983 for the commercial use of filling a pond as land reclamation on lands outside of the 53 acres, and of what is due from the Defendants to them in respect of the value of such soil material, under paragraph 15 hereof."

By judgment dated 15th October 1991 and entered on the 12th November 1991, Bertrand J. decided that: "In the premises there will be an Order on the plaintiffs' relief sought at paragraphs 19(5) and 20(5) only i.e. the defendants do give the plaintiff an account of the soil material removed from the remaining 47 acres more or less but limited to 4.131 acres from October, 1983 for the commercial use of filling a pond as land reclamation on lands outside of the 53 acres. And it is further ordered that the defendants do pay to the plaintiffs what is due to the said plaintiffs from the account given. There will be Costs to the plaintiffs on the relief granted, to be taxed if not agreed. The other reliefs sought by the Plaintiffs are hereby dismissed with no Order as to Costs since both parties, but more so the defendants, should have made a concerted effort to comply with the Order of the Court of Appeal in its entirety."

The appellants are dissatisfied with that judgment and have appealed against it. The two issues in this appeal are (1) the size of the quarry and (2) the validity or otherwise of the Order for an account.

(1) The size of the Quarry

In paragraph 2 of the 1985 Order, it is stated that the quarry was "agreed to be 6 acres more or less." In that paragraph, there

appears the ambiguous phrase "the said area to be identified by survey to James Morshead or other survey agreed on by the parties". The preposition "to" appearing in the ambiguous phrase is an obvious typographical error. The location of land may be identified by the landowner to a surveyor, but the identification of the area of the land is effected by surveys within the exclusive province of the professional surveyor. It is monstrous to suppose that a landowner would be required to identify land by survey to a surveyor. Since the ambiguous phrase should be interpreted so as to avoid manifest absurdity and to effectuate the evident intent of this Court, I do not hesitate to construe the preposition "to" as being synonymous with the preposition "by".

The crucial question required to be decided in this appeal is the meaning of the phrase "6 acres more or less" appearing in paragraph 2 of the 1985 Order or the extent of the elasticity of that phrase. To answer that question, we should be guided by the basic principle that where a word or phrase appears in a written instrument (for example a statute, contract, deed, document or Court Order), the meaning of that word or phrase is derived from the intention of the author of the written instrument. That intention is an inference drawn from the primary meaning of the word or phrase with such modifications to that meaning as may be necessary to make the word or phrase harmonise with its context. That context comprises the whole or every part of the written instrument and all relevant surrounding circumstances which may properly be regarded as indications of the author's intention. That context includes express provisions of the written instrument, necessary implications or inferences from those express provisions and surrounding circumstances such as the nature and object of the written instrument and the factual background against which it was made. Therefore, in order to determine the extent of the resilience of the phrase "6 acres more or less" appearing in paragraph 2 of the 1985 Order, it is necessary to examine the components of the context in which the phrase was used. This I

shall now attempt to do.

Firstly, the phrase appears in a Court Order (the 1985 Order), the evident object of which is to terminate and not to perpetuate litigation between the parties. We should therefore be slow to give the phrase a meaning which would defeat that object.

Secondly, the 1985 Order expressly provides that the area of the quarry would be identified by survey by Morshead or by "other survey agreed on by the parties". That express provision implies that although the quarry was physically identifiable, its area or extent required identification by survey. This implication is verified by the fact that Morshead executed the survey by reference only to the 1985 Order and without physical identification of the quarry by any of the parties. The same express provision also implies that the survey would be conclusive. It was alleged or suggested that the quarry was expanded after the 1985 Order and before Morshead's survey, but no evidence was adduced as to the extent of any such expansion. It must therefore be assumed the quarry surveyed by Morshead was the same quarry referred to in the 1985 Order.

Thirdly, the 1985 Order expressly and specifically awards the quarry to the appellants and orders that the remaining lands (the Farm less the quarry) be sold by public auction. No part of the Farm is allotted to the respondents. Instead, the 1985 Order expressly provides that the quarry shall be valued, that the appellants' share of the proceeds of sale of the remaining lands shall be abated by the amount of the valuation and that the abated sum (presumably the amount of the abatement) shall belong to the respondents. The evident object of those express provisions is to neutralise the importance of the size of the quarry. The prescribed valuation and abatement ensure that no injustice is done to the respondents as a result of any gross consensual underestimation of the size of the quarry.

Accordingly, having regard to the object, express provisions and necessary implications which constitute the most important ingredients of the context of the 1985 Order, the phrase "6 acres more or less" appearing in the 1985 Order is evidently intended to have a meaning or versatility which renders it capable of encompassing the 10.131 acres surveyed by Morshead. I therefore conclude that the survey which Morshead executed on the 21st April 1986 has conclusively established that the area of the quarry is 10.131 acres.

(2) The Order for an Account

In ordering the appellants to give to the respondents an account of the soil material removed from the Farm, the learned judge limited the account to soil material removed from 4.131 acres of land which has now been established to be part of the quarry comprising 10.131 acres. Since the appellants' sole ownership of the quarry began on the 11th June 1985 (the date of the 1985 Order), the appellants cannot be held liable to account for soil removed therefrom after that date.

The question however remains as to whether the appellants are liable to account to the respondents for soil material removed from the 4.131 acres between October 1983 and 11th June 1985 during which period the appellants and the respondents were co-owners of the 4.131 acres. That question invites consideration of the liability of a co-owner to account to the other co-owners.

The authorities cited by counsel establish that a co-owner of real property is liable to account to the other co-owners if he ousts the latter from the property or if he receives rents, profits or benefits which are the natural products of the property and which are in excess of his share or proportion of the property or the natural products thereof. In *Henderson v Eason* (1851) 17 Q.B. 701, Parke B (delivering the judgment of the Court of Exchequer

Chamber) said (at p.718):

"There is no doubt as to the law before the Statute of 4 Ann.c. 16. If one tenant in common occupied, and took the whole profits, the other had no remedy against him whilst the tenancy in common continued, unless he was put out of possession, when he might have his ejectment, or unless he appointed the other to be his bailiff as to his undivided moiety, and the other accepted that appointment, when an action of account would lie, as against a bailiff of the owner of the entirety of an estate.

Until the statute of Anne this state of the law continued. That statute provides, by section 27, that an action of account may be brought and maintained by one joint tenant and tenant in common, his executors and administrators, against the other, for receiving more than comes to his just share or proportion, and against the executor and administrator of such joint tenant or tenant in common; and the auditors are authorized to administer an oath."

Later Parke B said (at pp 720-721):

"Again, there are many cases where profits are made, and are actually taken, by one cotenant, and yet it is impossible to say that he has received more than comes to his just share. For instance, one tenant employs his capital and industry in cultivating the whole of a piece of land, the subject of the tenancy, in a mode in which the money and labour expended greatly exceed the value of the rent or compensation for the mere occupation of the land; in raising hops, for example, which is a very hazardous adventure. He takes the whole of the crops: and is he to be accountable for any of the profits in such a case, when it is clear that, if the speculation had been a losing one altogether, he could not have called for a moiety of the losses, as he would have been enabled to do had it been so cultivated by the mutual agreement of the cotenants? The risk of the cultivation, and the profits and loss, are his own; and what is just with respect to the very uncertain and expensive crop of hops is just also with respect to all the produce of the land, the fructus

industriales, which are raised by the capital and industry of the occupier, and would not exist without it. In taking all that produce he cannot be said to receive more than his just share and proportion to which he is entitled as a tenant in common. He receives in truth the return for his own labour and capital, to which his cotenant has no right."

Assuming that this is a proper case for an account, the learned judge's Order for an account does not define the 4.131 acres to which the Order relates. The Order may therefore be said to be void for uncertainty.

In any event, this is not a fit case for an account. There is no proof that the respondents were ousted from the 4.131 acres at any time. There is no proof that the appellants received more than their share or proportion of the Farm. On the contrary, the 4.131 acres with respect to which the appellants are required to account were in fact awarded to the appellants as part of their share or proportion of the Farm. This indicates that in removing soil material from the quarry, the appellants did not receive more than their share or proportion of the Farm. If the appellants' removal of soil material from the quarry before the 11th June 1985 was an act of destruction, destructive waste or devaluation of the quarry, this engendered an action in tort but not an action for account.

According to Halsbury's Laws of England (4th Edition) Vol. 27 paragraph 279: "Waste consists of any act or omission which causes a lasting alteration to the nature of the land in question to the prejudice of the person who has the remainder or reversion of the land. The obligation not to commit waste is an obligation in tort, and is independent of contract or implied covenant."

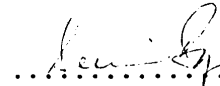
For the above reasons, I conclude that the judge's Order for an account is inappropriate and misconceived. I would therefore allow the appeal and set aside the said order and the judge's order

in relation to costs. However, since these proceedings are the direct result of the failure of the appellants and the respondents to implement the outstanding terms of the 1985 Order, I would order the respondents to pay to the appellants one half only of the appellants' costs of this appeal and of the proceedings in the Court below.

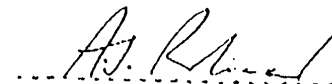


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SIR VINCENT FLOISSAC
Chief Justice

I concur.


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C.M.D. BYRON
Justice of Appeal

I concur.


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A. J. REDHEAD
Justice of Appeal (Ag.)